No. 15-108

In the Supreme Court of the United States

THE COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

LUIS M. SANCHEZ VALLE AND JAIME GOMEZ VAZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF COLEGIO DE ABOGADOS Y ABOGADAS DE PUERTO RICO AND THE PUERTO RICAN BAR ASSOCIATION, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF COLEGIO DE ABOGADOS Y ABOGADAS DE PUERTO RICO AND THE PUERTO RICAN BAR ASSOCIATION, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

The Constitution is the supreme law of the Nation. But for more than three million U.S. citizens who live in Puerto Rico, only portions of our foundational document apply.

Pursuant to the *Insular Cases*—a series of decisions by this Court dating from 1901—Puerto Rico is undeserving of the full panoply of constitutional rights because the island is "inhabited by alien races, differing from us" (*Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901)). That holding reflects views from a bygone era. But while the views have long since disappeared from mainstream American thought, this Court's racially motivated precedents remain in force, limiting the rights of millions of U.S. citizens living in the territories.

The Colegio de Abogados y Abogadas de Puerto Rico (also known as the Puerto Rico Bar Association) (the "Colegio"), founded in 1840, is the oldest professional organization in Puerto Rico and the Caribbe-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for the petitioner and the respondents have both filed blanket consents to the filing of *amicus curiae* briefs with the Clerk of this Court.

an. The Colegio represents approximately 5,000 active attorneys in Puerto Rico.

Since its founding, the Colegio has advocated for the civil and political rights of Puerto Ricans. It has frequently grappled with difficult questions regarding the relationship between Puerto Rico and the federal government and has adopted a series of resolutions asserting the right of Puerto Ricans to control their own status and political destiny through a constitutional process of self-determination.[2] A series of the Colegio's presidents, including current president Mark Anthony Bimbela, have testified before the United Nations on the need for decolonialization.[3]

The Puerto Rican Bar Association, Inc. ("PRBA") was founded at a time of rapid political and social

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[2] See Resol. No. 4, Asamblea General, Colegio de Abogados de Puerto Rico, Sept. 9, 2006; Resol. No. 5, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 28, 2006; Resol. No. 12, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 6, 2001; Resol. No. 13, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Feb. 27, 2010; Resol. No. 14, Junta de Gobierno, Colegio de Abogados de Puerto Rico, July 20, 1985; Resol. No. 14, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Oct. 20, 2007; Resol. No. 16, Asamblea General, Colegio de Abogados de Puerto Rico, Sept. 13, 1986; Resol. No. 29, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Jan. 19, 2008; Resol. No. 37, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Aug. 23, 2008; Resol. No. 38, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Jan. 28, 2006; Resol. No. 55, Junta de Gobierno, Colegio de Abogados de Puerto Rico, Aug. 19, 2006.

[3] See, *e.g.*, United Nations Gen. Assembly Special Comm. on Decolonization, *Crippling Trade Policies, Brain Drain, Sluggish Economy Constrain Puerto Rico's Progress, Petitioners Tell Decolonization Committee as Session Resumes*, June 22, 2015, http://www.un.org/press/en/2015/gacol3281.doc.htm.

change for Puerto Ricans living in Puerto Rico and elsewhere. Puerto Rican nationalism was suppressed by the Gag Law of 1948, P.R. Law No. 53 (1948), which criminalized expressive acts such as the possession of Puerto Rican flags. Efforts to invalidate the Gag Law under the First Amendment were unsuccessful, and the law remained in effect until it was repealed in 1957. That same year, a group of Puerto Rican and Latino attorneys in New York began gathering socially to offer each other personal and professional support in an era when it was difficult for Puerto Rican and Latino attorneys to be accepted as members in established bar associations.

Today, the PRBA is one of the largest and oldest ethnic bar associations in New York State, representing attorneys, judges, law professors and students who share a common interest in fostering professional development and addressing issues that are important to the Puerto Rican and other Latino communities.

This case is of particular importance to the *amici* because it implicates the political and legal relationship between Puerto Rico and the federal government. The case arises in the context of the dual-sovereign exception to the Double Jeopardy Clause, but any decision bearing on Puerto Rico's position in our federal system could have broader implications for Puerto Rico.

Amici submit this brief to familiarize the Court with the sordid history of the *Insular Cases* and their lasting impact on Puerto Rico. This Court should resist relying on the *Insular Cases* to resolve the instant dispute. In the proper case, the Court should reconsider the *Insular Cases* and should overrule them.

SUMMARY OF ARGUMENT

Over a century ago, in the wake of the Spanish-American War, this Court issued a series of decisions, now known collectively as the *Insular Cases*, in which it addressed the question whether and to what extent the Constitution applied, of its own force, in the territories that the United States had acquired in the conflict. The Court held that these territories, though part of the United States, had not been "incorporated" into the United States for constitutional purposes and that most provisions of the Constitution thus did not apply to their residents.

In this case, which presents the question whether Puerto Rico is a separate sovereign from the United States for purposes of the Double Jeopardy Clause, this Court may be inclined to look to the *Insular Cases* for guidance. But it need not and should not do so. The *Insular Cases* reflect badly outdated theories of imperialism and racial inferiority and have outlived their usefulness.

A.

The *Insular Cases* were decided during a heated national debate over how to govern the territories acquired by the United States in the Spanish-American War. Some Americans argued that the Constitution would apply in full to the new territories and lamented the consequences that would result. Others contended that the territories could and should be treated as colonies whose residents would not enjoy constitutional rights. The *Insular Cases* ultimately split the difference between these two positions, holding that the newly acquired lands were unincorporated territories where the Constitution would not fully apply without further congressional

action. This doctrine rests on assumptions that the Nation has long since rejected: namely, that U.S. citizens born in Puerto Rico are inferior to citizens born on the mainland and unready for free government, and that the United States therefore has the power to deny them equal rights and protection.

B.

The effects of the *Insular Cases* and their doctrine of "unincorporated" territories are still felt today. Though certain constitutional rights have been held to extend to Puerto Ricans and other territorial residents, many others have not. For example, residents of the territories do not enjoy the same right to a jury trial in criminal cases that the Sixth Amendment guarantees to other U.S. citizens. The *Insular Cases* have also helped give rise to a highly deferential form of equal protection jurisprudence, under which Congress is generally free to disadvantage Puerto Rico in allocating economic benefits. In these and other ways, the *Insular Cases* continue to deny Puerto Ricans full constitutional rights and perpetuate the colonial status of the territories.

C.

When presented with the appropriate opportunity, this Court should overrule the *Insular Cases*, whose imperialist reasoning is no longer tenable, and affirm that under the Constitution, U.S. citizens who live in the territories are entitled to the same civil rights as other U.S. citizens. And in *this* case, the Court should not rely upon the *Insular Cases*. Nor need it do so. Whatever the scope of Puerto Rico's authority under the Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319, and its progeny, a territory is not a separate sovereign from

the United States, whether it is "incorporated" or "unincorporated"; thus, the *Insular Cases* should not form the basis for this Court's resolution of the question presented.

ARGUMENT

A. The *Insular Cases* Are Based On Political And Social Beliefs That Have Long Since Been Rejected.

1. The Roots Of The Insular Cases *Were In Misguided Racial And Imperialist Ideas*

a. In the 1898 Treaty of Paris, which ended the Spanish-American War, the United States acquired Puerto Rico, the Philippines, and Guam from Spain.[4] This territorial expansion brought with it thorny legal and political questions. How were the new territories to be governed? Were they to be put on a path to statehood, or simply maintained in a state of perpetual dependency? And what legal rights would their inhabitants enjoy?

The "guns were barely silenced when a national debate ensued" over these very questions. Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 Yale L. & Pol'y Rev. 57, 65 (2013). That debate was especially lively in the legal community. In a series of articles published in the *Harvard Law Review* in 1898 and 1899, some of the leading scholars of the day put forth differing theories regarding whether and how the Constitution applied in the newly acquired territories. Their ideas had "para-

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[4] The Treaty also allowed the United States to occupy Cuba, which was made an independent state. See Treaty of Paris art. 1, U.S.-Sp., Dec. 10, 1898, http://avalon.law.yale.edu/19th_century/sp1898.asp.

mount influence" on the way in which this Court subsequently resolved the issue. *Ibid.*; see also Efren Rivera Ramos, *The* Insular Cases*: What Is There to Reconsider?*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 29, 29 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

b. One view, advocated by professors Carman Randolph of Columbia and Simeon Baldwin of Yale, posited that the Constitution applied, of its own force and in its entirety, in every place subject to the sovereignty of the United States, including the newly acquired territories.

"The Constitution," Randolph argued, "is a self-extending law, and so far as it covers our present possessions must cover future ones." Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291, 306 (1898). He concluded that as a result, U.S. citizens outside the states "possess the same personal and property rights that the people of the States enjoy." *Id.* at 302. Baldwin agreed with this view, stating that "the Constitution is the supreme law wherever the flag of the Union floats over its soil." Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 405 (1899).

c. A second view, espoused by Dean Christopher Columbus Langdell and Prof. James Bradley Thayer of Harvard Law School, surmised that the Constitution applied only to the States, and not to outlying territories.

Langdell hypothesized that the Constitution had "no application to territory which is subject to no

State sovereignty, and in which the United States can exercise all the power which can be exercised within a State either by the State or by the United States." C.C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365, 388 (1899). In Langdell's view, the "one known mode of incorporating newly acquired territory into the United States" and thereby entitling its citizens to the protections of the Constitution was "by admitting it as a State." *Ibid.* Thayer agreed that "when a new region is acquired it does not at once and necessarily become a part of what we call the 'territory' of the United States." James Bradley Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464, 471 (1899). Rather, he maintained, the United States had the "legal, constitutional power, to govern [newly acquired lands] as colonies, substantially as England might govern them." *Id.* at 467. Only if these territories were admitted to statehood would their inhabitants become entitled to plenary constitutional rights.

d. Finally, in an article that followed the others just discussed, Prof. Abbott Lawrence Lowell of Harvard proposed what he called a "Third View."

Lowell believed that neither Randolph and Baldwin's argument nor Langdell and Thayer's was wholly acceptable. He argued that Randolph and Baldwin's position—that the Constitution applied fully in the territories—was "irrational, because it extends the restrictions of the Constitution to conditions where they cannot be applied without rendering the government of our new dependencies well-nigh impossible." Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 Harv. L. Rev. 155, 157 (1899). On the other hand, he explained, Langdell and Thayer's view—that the Con-

stitution had *no* application in the territories—produced anomalous and troubling consequences: Congress could take property from persons in the District of Columbia or the territories without just compensation, or pass bills of attainder there. *Id.* at 156-57

Lowell articulated an intermediate position: that "possessions acquired by conquest or cession do not become a part of the United States," and could be "incorporat[ed]" into the Union only by legislative action. Lowell, *supra*, at 176. In unincorporated territories, Lowell explained, certain constitutional provisions would apply, but others, "such as those requiring uniformity of taxation and trial by jury," would not. *Ibid.*

e. Despite their differing legal conclusions, all of these scholars shared the belief that the inhabitants of the newly acquired territories were so different from and inferior to the U.S. citizens who resided in the States that applying the Constitution in these territories would be cause for concern.

Those who held that the Constitution applied only in the States were certainly of this view. Langdell suggested that the Bill of Rights was "so peculiarly and so exclusively English that an immediate and compulsory application of [it] to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races, as our bitterest enemies could desire." Langdell, *supra*, at 386. And Thayer opined that admitting any "extra-continental" state into the Union was an "intolerable suggestion." Thayer, *supra*, at 484.

But even those who held that the Constitution followed the flag everywhere in the world were rueful of the fact. Baldwin commented that giving "the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico" constitutional rights would be a "serious obstacle to the maintenance there of an efficient government." Baldwin, *supra*, at 415. Randolph, for his part, declared that the "Philippine islanders are, and are likely to remain, unfit for statehood," and he suggested various ways in which the United States could avoid annexing the Philippines and triggering application of the Constitution. Randolph, *supra*, at 305.

Lowell, the proponent of the "Third View," likewise believed that the inhabitants of the new territories differed from other U.S. citizens in significant ways. Indeed, he relied on that proposition in order to distinguish between the constitutional rights that he thought should apply in the territories and those that should not. He explained that "restrictions upon the power of Congress" have a "universal bearing" and thus applied everywhere, including unincorporated territories. Lowell, *supra*, at 176. By contrast, he argued, "the rights guaranteed to the citizens," such as those found in the Bill of Rights, were "inapplicable except among a people whose social and political evolution has been consonant with our own"—which, in his view, the inhabitants of the new territories were not. *Ibid.*

Thus, at the time that the *Insular Cases* were decided, there was widespread agreement that applying the full panoply of constitutional provisions in the new territories was unwise because the populations of those territories were not ready for such rights and enforcing them would tie the hands of ter-

ritorial governments. The real debate was over whether the law nonetheless *required* that the Constitution be enforced there. It was this question that was presented for review in the *Insular Cases*.

2. *The* Insular Cases *Made These Now-Discredited Beliefs The Basis For A Rule Of Constitutional Law*

a. There is disagreement among commentators as to which cases are encompassed by the term "*Insular Cases*," but at a minimum, the term refers to six cases decided by this Court on May 27, 1901.[5] These cases addressed legal issues that had arisen in the wake of the Foraker Act, which Congress enacted in 1900 to provide for a territorial government in Puerto Rico. The Act imposed duties on trade between Puerto Rico and the mainland United States in order to fund the new government. Pub. L. No. 56-191, §§ 2-4, 31 Stat. 77, 77-78 (1900).

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[5] *De Lima* v. *Bidwell*, 182 U.S. 1, 200 (1901) (holding that Puerto Rico is not a "foreign country" for purposes of tariff laws); *Goetze* v. *United States*, 182 U.S. 221, 221-22 (1901) (same, with respect to Puerto Rico and Hawaii); *Dooley* v. *United States*, 182 U.S. 222, 236 (1901) (holding that the President's Article II authority to impose tariffs on goods imported to Puerto Rico from the United States expired after the island was ceded to the United States); *Armstrong* v. *United States*, 182 U.S. 243, 244 (1901) (same); *Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901) (holding that Puerto Rico is not part of the United States for purposes of the Uniformity Clause); *Huus* v. *New York & Porto Rico S.S. Co.*, 182 U.S. 392, 397 (1901) (holding that a ship traveling between New York and Puerto Rico was engaged in the "coasting trade," rather than in foreign commerce).

b. In the first of the *Insular Cases*, *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), a firm that had paid tariffs on goods imported to New York from Puerto Rico *before* the enactment of the Foraker Act sued to recover the tariffs, arguing that Puerto Rico was not a foreign country and that the imports thus should not have been taxed. The Court agreed, holding that a territory could not "be at the same time both foreign and domestic" and that Puerto Rico was thus part of the United States, for purposes of the tariff laws, from the moment it was acquired in the Treaty of Paris. *Id.* at 199-200.

In dissent, Justice McKenna borrowed from Lowell's incorporation theory to argue that the tariffs had been properly collected. The majority opinion, he contended, presumed that Puerto Rico had been incorporated into the United States by the Treaty of Paris, when in fact it had not. *De Lima*, 182 U.S. at 217 (McKenna, J., dissenting). The treaty, in Justice McKenna's view, had left the question of incorporation to Congress. *Id.* at 214.

Justice McKenna warned against the dangers he perceived would follow from concluding that "our Constitution and laws, immediately apply on cession of territory." *De Lima*, 182 U.S. at 219. He explained that if that were the case, the government "could make no accommodation to exigency [and] would stand bound in a helpless fatality." *Ibid.* Construing the treaty and the Constitution not to incorporate Puerto Rico into the United States would allow the territories to be governed with a freer hand and avoid "the danger of the nationalization of savage tribes." *Ibid.*

c. *De Lima*'s conclusion that Puerto Rico was part of the United States led inexorably to the next

and most significant of the *Insular Cases*, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), where the incorporation theory featured prominently again.

Downes presented the question whether the Foraker Act's duties on goods transported between Puerto Rico and the mainland violated the Uniformity Clause of the Constitution, which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The Court held by a five-to-four vote that the Act was constitutional because the Uniformity Clause did not apply to Puerto Rico, but the Justices in the majority produced several different opinions explaining why this was so.

Justice Brown, who announced the judgment of the Court but wrote only for himself, worried openly about the potential consequences of holding that the Constitution fully applied, of its own force, in every place subject to the control of the United States. "It is obvious," he explained, "that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people * * * which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians." *Downes*, 182 U.S. at 282.

Justice Brown observed that because the "alien races" that inhabited the new territories that the United States had acquired differed from other Americans in "religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." *Downes*, 182 U.S. at 287. Thus, he argued, it was appropriate

that "large concessions . be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them." *Ibid.* He concluded "that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution." *Ibid.*

Justice Edward White, writing for himself and two other Justices, concurred in the judgment on the basis of Lowell's incorporation theory. He argued that "where a treaty contains no conditions for incorporation * * * that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." *Downes*, 182 U.S. at 339 (White, J., concurring). Because no such incorporation had occurred, he explained, "while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense." *Id.* at 341.

The final member of the majority, Justice Gray, agreed "in substance" with Justice White's opinion, but he wrote separately to explain that the basis for his views was his belief that "[c]ivil government cannot take effect at once" in "territory acquired by war"; rather, he argued, "[t]here must, of necessity, be a transition period." *Downes*, 182 U.S. at 345 (Gray, J., concurring). "If Congress is not ready to construct a complete government for the conquered territory," he concluded, "it may establish a *temporary* government, which is not subject to all the re-

strictions of the Constitution." *Id.* at 346 (emphasis added).

In dissent, Justice Harlan denounced the majority's reasoning. He vehemently denied the notion that "Congress can deal with new territories just as other nations have done or may do with their new territories." *Downes*, 182 U.S. at 380 (Harlan, J., dissenting). "This nation," he explained, "is under the control of a written constitution * * * Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States." *Ibid.*

d. Although the incorporation theory failed to command a majority of the Court in *Downes*, it soon became enshrined as a feature of U.S. constitutional law. Just three years later, the Court decided *Dorr* v. *United States*, 195 U.S. 138 (1904), where five Justices agreed for the first time that there was a constitutional distinction between incorporated and unincorporated territories.

In *Dorr*, two petitioners convicted of criminal libel in the Philippines without a jury challenged their convictions under the Sixth Amendment. Relying heavily on *Downes*, the majority concluded that Congress was not required to "enact for ceded territory

not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated." *Dorr*, 195 U.S. at 149. The Court accordingly sustained the petitioners' convictions.

e. In 1917, the legal status of the inhabitants of Puerto Rico underwent a dramatic change with the passage of the Jones-Shafroth Act. The Jones-Shafroth Act declared all Puerto Ricans to be U.S. citizens, and it set out a "Bill of Rights" granting certain legal rights—though not all the rights contained in the Constitution's Bill of Rights—to Puerto Ricans. Pub. L. No. 63-368, ch. 145, §§ 2, 5, 39 Stat. 951, 951-53 (1917).

Five years later, in *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922), the Court was confronted with the question whether the grant of U.S. citizenship to Puerto Ricans had changed the unincorporated status of the territory. *Balzac*, like *Dorr*, involved a petitioner convicted of criminal libel without a jury, this time in Puerto Rico. The petitioner in *Balzac* argued that his conviction violated the Sixth Amendment.

The Court now held unanimously that Puerto Rico had not been incorporated and that the Sixth Amendment thus did not apply there. Writing for the Court, Chief Justice Taft rejected the petitioner's argument that the Jones-Shafroth Act, by conferring U.S. citizenship on Puerto Ricans, had made Puerto Rico an incorporated territory. The Chief Justice acknowledged that an act of Congress "declaring an intention to confer political and civil rights on the inhabitants of * * * new lands as American citizens" could cause a territory to be incorporated. *Balzac*,

258 U.S. at 309. Indeed, the Court had relied on such an act when it held in *Rassmussen* v. *United States*, 197 U.S. 516 (1905), that Alaska was an incorporated territory. See *id.* at 522 (holding that treaty language providing that "inhabitants of [Alaska] * * * shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States" incorporated Alaska into the United States) (internal quotation marks omitted).

The Chief Justice explained, however, that Puerto Rico presented a much different case from Alaska: "Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when." *Balzac*, 258 U.S. at 310. Accordingly, the Court should not "lightly" infer "an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people." *Id.* at 311.

The Court thus held that the Jones-Shafroth Act had not incorporated Puerto Rico into the United States. Although *Balzac* acknowledged that "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico," other rights would not apply in Puerto Rico unless and until it became incorporated. *Balzac*, 258 U.S. at 312-13. This holding completed the "constitutional[] rationaliz[ation]" of the colonial status of the territo-

ries that began in *Downes*. See Carlos Ivan Gorrin Peralta, *Puerto Rico and the United States at the Crossroads*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 183, 183 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

B. As A Result Of The *Insular Cases*, Puerto Ricans And Other Territorial Residents Still Lack Full Constitutional Rights.

1. Under *Balzac*, this Court has held that a number of specific constitutional rights are sufficiently "fundamental" to apply in unincorporated territories such as Puerto Rico.[6] But the Court has never reexamined the validity of the *Insular Cases*' incorporation doctrine, although a number of Justices have criticized the decisions. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 475-76 (Brennan, J., concurring) ("Whatever the validity of the [*Insular Cases*] * * * in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's."); *Reid* v. *Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) ("[N]either the [*Insular Cases*] nor their reasoning should be given any further expansion."). As a

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[6] See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974) (Due Process Clause of either the Fifth or Fourteenth Amendment); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 601 (1976) (equal protection right under either the Fifth or Fourteenth Amendment); *Torres* v. *Puerto Rico*, 442 U.S. 465, 471 (1979) (Fourth Amendment, either "directly or by operation of the Fourteenth Amendment").

result, Puerto Ricans and other territorial residents do not enjoy all of the civil rights granted to other U.S. citizens.

2. Perhaps the most glaring disparity imposed by the *Insular Cases* is that Puerto Ricans, unlike other U.S. citizens, have only limited rights to a jury trial in criminal cases.

Because the Sixth Amendment does not apply in Puerto Rico, defendants in local Puerto Rican courts enjoy only those rights provided by the Constitution of Puerto Rico. Under the Puerto Rican constitution, jury trials are required only for felony cases. P.R. Const. art. II, § 11. By contrast, the Sixth Amendment guarantees to defendants a right to jury trial in *all* state and federal criminal cases where the potential punishment exceeds six months. See *Lewis* v. *United States*, 518 U.S. 322, 326 (1996). Thus, under the *Insular Cases*, many Puerto Ricans are tried without juries in situations where citizens of the States would enjoy that vital constitutional protection.

3. Another troubling consequence of the *Insular Cases* is that they have contributed to the development of a weakened form of equal protection doctrine that allows Congress to enact laws that overtly disfavor Puerto Rico, evidencing Puerto Rico's colonial status.

The first decision in this vein was *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam), where the Court considered a constitutional challenge to Social Security's Supplemental Security Income (SSI) program. The SSI program, which provides aid to elderly, blind, and disabled persons, makes benefits available only in the "50 States and the District of Co-

lumbia." 42 U.S.C. § 1382c(e). Several petitioners, who received SSI benefits while residing in various States and then lost them upon moving to Puerto Rico, alleged that this denial of benefits was unconstitutional. A three-judge district court agreed with the petitioners.

On appeal, this Court summarily reversed. The basis for the lower court's decision had been the constitutional right to travel, which the Court held did not require a State to "continue to pay * * * benefits indefinitely to any persons who had once resided there." *Torres*, 435 U.S. at 4. But the Court also addressed and rejected the claim in the petitioner's complaint that excluding Puerto Rico from the SSI program violated equal protection. The Court agreed with the lower court that "Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it." *Id.* at 3 n.4. As support for that proposition, the Court cited *Balzac*, *Dorr*, and *Downes*.

Similarly, in *Harris* v. *Rosario*, 446 U.S. 651 (1980) (per curiam), the Court rejected an equal protection challenge to the Aid to Families with Dependent Children (AFDC) program, under which "Puerto Rico receives less assistance than do the States." *Id.* at 651. The Court held that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Id.* at 651-52 (citing *Torres*, 435 U.S. at 1). The Court found there to be three such rational bases: "Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy." *Id.* at 652.

Torres and *Harris* were both decided *after* Congress enacted Public Law 600, which allowed Puerto Rico to adopt its own constitution and organize its own local government. The decisions confirm that although Public Law 600 elevated Puerto Rico's status in an "abstract juridical sense," to that of a "commonwealth," the "unavoidable reality" is that federal authority over Puerto Rico remains "utterly unbridled." See Rafael Cox Alomar, *The Ideological Decolonization of Puerto Rico's Autonomist Movement*, in Reconsidering the Insular Cases: The Past and Future of the American Empire 129, 152-55 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

From an economic perspective, therefore, Puerto Ricans are not the equals of other U.S. citizens. Congress can, and does, treat them differently from residents of the States.

C. This Court Should Reject Any Further Reliance On The *Insular Cases*.

1. *In An Appropriate Case, The* Insular Cases *Should Be Overruled*

a. The outdated reasoning of the *Insular Cases* has long since been discarded by the American people. No one today would contend that Puerto Ricans or other territorial residents are an "alien race[]" unprepared for the "blessings of a free government," *Downes*, 182 U.S. at 287, or "savage tribes" unworthy of inclusion in American society. *De Lima*, 182 U.S. at 219 (McKenna, J., dissenting). Nor is it plausible any longer to suggest that the United States has the power to "govern [the territories] as colonies." Thayer, *supra*, at 467 Such imperialist notions are now recognized as incompatible with the high ideals

of freedom, equality, and self-determination for which the United States should stand.

To the extent that the *Insular Cases* rested on the theory that it would be best to withhold constitutional guarantees from territorial residents "for a time" to allow for political transition, *Downes*, 182 U.S. at 287, that justification for the cases has likewise been eroded. One hundred and seventeen years have elapsed since the end of the Spanish-American War, and today, Puerto Rico, like all of the other territories of the United States, has a well ordered and democratic local government. The "temporary" suspension of rights that the *Insular Cases* authorized is simply no longer warranted. *Id.* at 346 (Gray, J., concurring). On the contrary, leaving the *Insular Cases* in place suggests that it is acceptable to maintain Puerto Rico in a permanent state of colonialism and hinders the decolonialization process that the Colegio has promoted through self-determination by a constitutional assembly convention.

To be sure, cultural differences between the territories and the rest of the United States remain. But those differences are not nearly great enough to justify denying important constitutional rights to territorial residents. For example, although the Court in *Balzac* doubted whether Puerto Ricans were prepared for the "responsibilities" of a system of jury trials, today, Puerto Ricans serve on juries in felony cases in local courts without difficulty.[7] The Revised

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[7] Puerto Ricans have also served on juries in the U.S. District Court for the District of Puerto Rico since shortly after its creation in 1900—long before *Balzac* was decided. See Pub. L. No. 294, ch. 3542, 34 Stat. 466 (1906) (defining qualifications of jurors in the U.S. District Court for the District of Puerto Rico).

Organic Act of the Virgin Islands also provides for jury trials in some criminal cases, see 48 U.S.C. § 1616, as do the Organic Act of Guam, *id.* § 1421b(u), and the Commonwealth Code of the Northern Mariana Islands. 7 N. Mar. I. Code § 3101. It no longer makes sense to distinguish between the States and the territories for purposes of the Sixth Amendment and other important rights.

In short, the distinction between incorporated and unincorporated territories has long since lost whatever justification underlay it. This Court should consider abrogating the *Insular Cases* when presented with the appropriate opportunity to do so.

b. Although the *Insular Cases* are long-standing precedents, *stare decisis* does not counsel against this Court's overruling them.

As this Court has observed, "*[s]tare decisis* is not an inexorable command; rather, 'it is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In particular, the Court will not apply *stare decisis* "when governing decisions are unworkable or are badly reasoned." *Id.* at 827. The reasoning of the *Insular Cases* no longer stands up to scrutiny, and this Court is not obliged to follow it.

Moreover, *stare decisis* is at its weakest in constitutional cases, where "correction through legislative action is practically impossible." *Id.* at 828 (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). The *Insular Cases* present just that difficulty: although Congress has the power to change the status of Puerto Rico or other territories if it chooses, it has no power to alter the constitutional doctrine of incorporated and unincor-

porated territories. Only this Court can abolish that arbitrary distinction, and in an appropriate case, it should do so.

2. *The Court Should Not Rely On The* Insular Cases *In Deciding This Case*

This case does not squarely present the question whether the *Insular Cases* remain good law, but the Court's treatment of them here will affect their precedential value. The Court thus should avoid relying in any way on the *Insular Cases* in resolving this matter. Doing so would wrongly send a message to Congress, the Executive, and lower courts that the flawed reasoning of those cases remains valid.

The Court need not refer to the *Insular Cases* here, because as respondents point out in their brief, the question whether Puerto Rico is a separate "sovereign" for purposes of the Double Jeopardy Clause does not depend on whether the Commonwealth of Puerto Rico is an "incorporated" or "unincorporated" territory. Resp'ts' Br. 20.

Rather, as the Supreme Court of Puerto Rico rightly concluded, the mere fact that Puerto Rico is a territory is dispositive of the question presented. As the Court has long recognized, "a territorial government is entirely the creation of Congress, 'and its judicial tribunals exert all their powers by authority of the United States.'" *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978) (quoting *Grafton* v. *United States*, 206 U.S. 333, 354 (1907)). Thus, "[w]hen a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Ibid.* (internal quotation marks omitted). In other words, "Territory

and Nation[] are not two separate sovereigns to whom the citizen owes separate allegiance in any meaningful sense, but one alone." *Ibid.*

Recognizing the federal origin of Puerto Rico's authority does not demean the residents of Puerto Rico. The Constitution of Puerto Rico accords real personal rights to Puerto Ricans, and Puerto Ricans have long exercised substantial autonomy in organizing their internal affairs. But, that autonomy notwithstanding, there remains no such thing as a "sovereign territory." Puerto Rico's territorial status therefore settles the question whether it is a separate sovereign under the Double Jeopardy Clause conclusively. See *United States* v. *Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) ("[T]he Court has held that the Territories are the United States for double jeopardy purposes * * * It is for this reason * * * that the degree of autonomy of Puerto Rico is beside the point.").

CONCLUSION

The judgment of the Supreme Court of Puerto Rico should be affirmed.

Respectfully submitted.

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